

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROSS-VIKING MERCHANDISE CORP.	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Year 1985.	:	

Petitioner, Ross-Viking Merchandise Corp., 25 Hub Drive, Melville, New York 11747, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the year 1985 (File No. 807003).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 9, 1990 at 2:45 P.M. Petitioner appeared by Frederic N. Bruckner, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

ISSUE

Whether there is reasonable cause to waive penalties under Tax Law § 1085(a)(1) and (2) for late filing and late payment of corporation franchise tax where the income of the taxpayer had been included in a combined report which, however, had been rejected.

FINDINGS OF FACT

Petitioner, Ross-Viking Merchandise Corp., of Melville, New York was a distributor of batteries and bulbs to supermarkets. For tax purposes it had a fiscal year ending September 30.

As of December 31, 1984, petitioner's stock was acquired by Supermarket Services, Inc. ("SMS") of Linden, New Jersey. SMS was a distributor of non-food items, including health and beauty aids, primarily to supermarkets. The fiscal year of SMS ended March 31. The books of petitioner were transferred over to SMS.

(a) On November 22, 1985, SMS entered into a Chapter 11 bankruptcy proceeding. A

disclosure statement by SMS (the "debtor") in the bankruptcy proceedings stated as follows:

"The Debtor's financial difficulties which led to the commencement of the Case on November 22, 1985 were caused by a combination of factors which reduced its working capital and caused it to sustain substantial losses. For the fiscal year ended March 31, 1985, the Debtor sustained an estimated loss of approximately \$17,400,000 (unaudited). Some of the causes for this loss remain unexplained. However, the Debtor's current information suggests that this loss can be attributed to (i) significant inaccuracies in the Debtor's inventory levels and the records maintained in respect thereto and (ii) inadequate accounting procedures, inventory controls, overhead checks and security measures."

(b) In 1985 the auditors of SMS, Touche-Ross, refused to issue an audit report or to prepare tax returns because of the turmoil in the accounting practices of SMS.

Petitioner filed Federal and State income tax returns for the short period October 1, 1984 through December 31, 1984. Petitioner's income for the period January 1, 1985 through March 31, 1985 was included in a timely filed Federal consolidated tax return of SMS for the fiscal year ending March 31, 1985. It was also included in a timely filed combined New York State return filed by SMS for the same period. These returns had to be filed by a certified public accountant hired temporarily by SMS.

The combined report for the period January 1, 1985 through March 31, 1985 was rejected by the Division of Taxation on the ground that the corporations were not similar enough to each other.

Petitioner filed a return for the three-month period ending March 31, 1985 on June 30, 1987. The return reported Federal taxable income for the period of \$2,902,489.00 and computed New York business income before allocation of \$2,916,926.00. Allocated net income was \$1,475,498.00 and net tax due was \$147,550.00. Petitioner claimed a credit of \$141,338.00 and showed a tax due of \$6,212.00. A return was also filed for the Metropolitan Transportation Business Tax Surcharge showing a surcharge due of \$25,084.00 and, after a credit of \$24,028.00, a balance due of \$1,056.00.

(a) A Notice of Deficiency for the three-month period ending March 31, 1985 was issued on January 13, 1988 for corporation franchise tax imposed by Tax Law § 209, for penalties under Tax Law § 1085(a)(1) and (2) of \$41,678.75, plus interest of \$17,960.88, for a

total due of \$59,639.63. The interest was \$17,360.86 on tax due before a claimed net operating loss carryback and \$600.12 because of late payment.

(b) An additional notice was issued on the same day for the Metropolitan Transportation Business Tax Surcharge imposed by Tax Law § 209-B, for penalties under Tax Law § 1085(a)(1) and (2) in the amount of \$5,953.26 and interest of \$832.91, for a total due of \$6,786.17. The interest was \$730.91 on tax due before the carryback and \$102.00 because of late payment.

CONCLUSIONS OF LAW

A. The penalties for late filing and late payment of franchise tax under Tax Law § 1085(a)(1) and (2) shall be cancelled. There is reasonable cause and a lack of willful neglect for the late filing. Petitioner had first joined in the filing of a combined return with its parent corporation. Even if it was mistaken in doing this, a mere mistake in the type of return to file has been held to preclude penalties as even one of the cases cited by the Division of Taxation points out (Sanderling, Inc. v. Commr., 571 F2d 174; see American Circus Joint Venture v. Commr., 39 BTA 605; Frease v. Commr., 3 TCM 708, affd 150 F2d 403). Furthermore, to the extent that the failure to file or pay was due to bad recordkeeping, it is clear that the failure was on the part of petitioner's corporate parent and its employees and certainly was unanticipated by petitioner.

B. The petition of Ross-Viking Merchandise Corp. is granted and the notices of deficiency issued January 13, 1988 are cancelled.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE